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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 449

KELLOGG COMPANY,
KELLOGG SALES COMPANY,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

KELLOGG COMPANY,
KELLOGG SALES COMPANY,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Kellogg Company and Kellogg Sales Company petition that a writ of certiorari issue to review a judgment of the United States Court of Claims (R. 109, Appendix 31 herein) which dismissed (Judge Laramore and Judge Madden dissenting) the petitioners' suit for a refund of federal excise taxes paid on the transportation of property under Section 3475(a) of the Internal Revenue Code of 1939, as amended, prior to the amendment of that section in 1950.

OPINION BELOW.

The opinion of the court below has not yet been reported. It appears in the record at pages 89-94. The concurring opinion of Judge Whitaker appears in the

record at page 94. The dissenting opinion of Judge Laramore, in which Judge Madden joins, appears in the record at pages 94-96. The opinion of the court, concurring opinion and dissenting opinion are set forth in the Appendix herein.

JURISDICTION.

The judgment of the court below is dated and was entered on July 12, 1955. No petition for rehearing was filed. Jurisdiction of this court is conferred by 62 Stat. 928, 28 U. S. C. A. 1255.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether Section 3475(a) of the Internal Revenue Code of 1939, prior to its amendment in 1950, imposing an excise tax on amounts paid within the United States for the transportation of property may be interpreted to impose such tax on amounts paid outside the United States.

2. Whether amounts paid for the transportation of property by cashier's checks physically delivered to, and accepted by the carriers in Canada may be deemed to be paid within the United States.

STATUTE INVOLVED.

The pertinent portion of the statute involved is Section 3475(a) of the Internal Revenue Code of 1939, as amended [added by Sec. 620(a), Act of October 21, 1942], 56 Stat. 979, providing as follows:

> "(a) Tax.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another,

a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation."

STATEMENT OF THE CASE.

During the period from July 31, 1950 to October 30, 1950, the petitioners made payments in Windsor, Ontario, Canada, to agents of The New York Central Railroad and Grand Trunk Western Railroad (R. 47, 50, 53, 56) of freight charges incurred by the petitioners on shipments of raw material, merchandise and other property transported from one point in the continental United States to another point in the continental United States. The payments were made by having an employee physically deliver to the railroad agents in Windsor cashier's checks drawn to the order of petitioners and indorsed by them to the respective railroads. The cashier's checks were issued by the Michigan National Bank, Battle Creek, Michigan, and were payable through the Detroit Branch of the Federal Reserve Bank of Chicago (R. 65, 73, 79, 85).

The payments thus made included the amounts of the freight charges and the 3 percent excise tax which the

railroads insisted on collecting and which the petitioners protested at the time of payment (R. 63, 71, 77, 83). The railroads acknowledged receipt of the cashier's checks in Canada in payment of said freight bills (R. 63, 71, 77, 83).

The method of payment so employed was adopted for the admitted purpose of avoiding the tax imposed at that time by Section 3475(a) of the Internal Revenue Code of 1939, as amended (R. 59).

Timely claims were filed by the petitioners with the Commissioner of Internal Revenue for refund of the taxes so paid and collected, but said claims were rejected in full. Suit was then instituted in the Court of Claims which had jurisdiction under the Act of June 25, 1948, C. 646, 62 Stat. 940, 28 U. S. C. A. 1491.

REASONS FOR ALLOWING THE WRIT.

1. The Decision of the Court of Claims That Congress Intended to Impose the Transporation Tax on Shipments Wholly Within Continental United States, Without Regard to the Place of Payment of the Transportation Charges, Is In Conflict with Applicable Decisions of This Court.

Notwithstanding the clear and unequivocable language of the statute imposing the tax only "*upon the amount paid within the United States*", the Court of Claims construed the statute as being intended by Congress to impose the tax on all shipments within the United States (R. 93, Appendix 14). To thus extend the tax by statutory construction is in conflict with repeated pronouncements of this court.

In *Gould* v. *Gould*, 245 U. S. 151, 153, quoted in the dissenting opinion (R. 96, Appendix 17), this court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions,

> by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

To the same effect see: *United States* v. *Merriam*, 263 U. S. 179, 187-188; *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *McFeely* v. *Commissioner of Internal Revenue*, 296 U. S. 102, 111.

The construction of the statute by the Court of Claims also is in conflict with an interpretive ruling issued by the Commissioner of Internal Revenue on December 7, 1942, a little more than a month after the enactment of the tax:

> "6. The tax does not apply to the amount paid for the transportation of property: * * *
> (c) when paid outside the United States, regardless of where the transportation occurs;"
> Mim. 5447, December 7, 1942, 1942-2 *Cumulative Bulletin* 280.

The regulations promulgated by the Commissioner in 1943 explicitly provided that the tax applies only to *amounts paid within the United States*. Reg. 113, Secs. 143.11, 143.13.

Notwithstanding the clear and unambiguous language of the 1942 statute, the Court of Claims stressed (R. 91, 92; Appendix 12, 13) a press release of the Commissioner issued on July 7, 1950, and Congressional Committee reports in connection with the 1950 Amendment as supporting its construction of the 1942 statute. The court apparently attached no significance to the 1950 amendment (Sec. 607 (b), Act of Sept. 23, 1950, 64 Stat. 966) which altered the statute to provide that the tax applied to "the amount paid *within or without* the United States", effective on or after November 1, 1950. The court also apparently overlooked the Commissioner's regulations adopted to con-

form with the 1950 amendment (quoted in the dissenting opinion, R. 95, Appendix 16, 17) which expressly recognized that the tax applies to amounts paid without the United States only on and after November 1, 1950 (Reg. 113, Secs. 143.11, 143.13(a), as amended by T. D. 5826, January 12, 1951).

The construction of the statute adopted by the Court of Claims results in defining the phrase *paid within* as the equivalent of the phrase *paid within or without*. This court has repeatedly decried the practice of "construing" statutes which are clear on their face. The following comments are indicative:

> "Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." *Russell Motor Car Company* v. *United States*, 261 U. S. 514, 519.
>
> "But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v. *Rathbone*, 175 U. S. 414, 419.

2. The "Serious Doubt" Expressed by the Court of Claims As to Whether Payment Was Actually Made In Canada Is In Conflict With the Stipulated Facts and the Law.

Under the stipulation of facts upon which petitioners' cases were submitted, it is established that the freight charges were paid by physically delivering cashier's checks to the railroad agents in Windsor, Canada, and that the railroad agents acknowledged receipt of such checks in Canada (R. 48, 51, 53, 56, 58). The Court of Claims so found the facts (R. 99, 101, 104, 106, 107, 108; Appendix 21, 23, 25, 28, 29, 30).

The railroad was authorized to receive such checks. *Fullerton Lumber Co.* v. *Chicago M. St. P. & P. R. Co.*,

282 U. S. 520, 522; rules of the Interstate Commerce Commission, 49 CFR 142.11. There is nothing in the record to indicate that the checks were not honored, and it seriously could not be urged that cashier's checks drawn by a national bank on funds deposited with a federal reserve bank were not paid.

Under these circumstances, the "serious doubt" expressed by the Court of Claims as to whether payment was actually made in Canada is without foundation. The location of the issuing and drawee banks, the indorsement within this country, or the fact that payment by check is conditional until honored, do not determine the place of payment. It is the established rule that when payment is made by check, payment is made as of the date the check is given, not when it is cashed.

> "Payment by bill or check becomes absolute payment of the debt when the check is paid on presentation. On such payment of the check, the debt is deemed to have been discharged from the time the check was given." 40 *Am. Jur.*, Payment § 86. See also *Second National Bank of Saginaw* v. *United States*, 42 F. 2d 344, 345.

Since the *time* a check is given determines *when* payment is made, the *place* a check is given establishes *where* payment is made. It is inconceivable that time and place of payment may be divorced from each other. The logic of this analogy is apparent by stating conversely the elements set forth in the opinion of the Court of Claims to negate payment in Canada. Thus, if petitioners had obtained cashier's checks *issued* by a Canadian bank, *drawn* on another Canadian bank, *indorsed* in Canada, but *delivered* to the railroads in the United States, there is no doubt that the court below would have declined to rule that payment was made in Canada. Yet the court below relies upon exactly the opposite facts as showing that payment was made in the United States.

The error of the court below on this phase of the law

was crucial to the petitioners' claims. Two judges in dissenting found that "the physical delivery of the cashier's checks was clearly payment without the United States within the meaning of Section 3475(a) of the Internal Revenue Code" (R. 96, Appendix 18). Judge Whitaker concurred with Chief Judge Jones and Judge Littleton "on the ground that payment was made within the United States" (R. 94, Appendix 15). Except for the error on this point, the decision would have been in favor of petitioners.

CONCLUSION.

It seems probable that the judgment of the court below was adversely affected by the admitted purpose of petitioners to avoid payment of the tax. The propriety of tax avoidance is not open to challenge. *Gregory* v. *Helvering*, 293 U. S. 465, 469; *United States* v. *Isham*, 84 U. S. 496, 506.

In addition, the court below failed to note that the commissioner had originally sanctioned the procedure adopted by petitioners (letter ruling, dated April 11, 1950, reprinted in 505 CCH-*Standard Federal Tax Reports*, ¶ 6151), and petitioners' payments were intended to give them the same tax savings which the Commissioner had accorded to others.

The questions presented warrant review by this Court, and the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF CLAIMS
(Decided July 12, 1955)

No. 106-54

KELLOGG COMPANY, A CORPORATION, v. THE UNITED STATES

No. 107-54

KELLOGG SALES COMPANY, A CORPORATION, v. THE UNITED STATES

Mr. Herbert Morton for the plaintiffs.

Mr. Benjamin H. Pester, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for the defendant. *Messrs. Andrew D. Sharpe* and *Edmund C. Grainger, Jr.*, were on the brief.

OPINION.

JONES, *Chief Judge*, delivered the opinion of the court:

The issue in these consolidated cases is whether under section 3475 (a) of the Internal Revenue Code of 1939, as amended, the plaintiffs were properly required to pay transportation taxes on shipments of property entirely within the United States, in instances where it is shown that checks to cover the transportation charges were physically delivered to the transportation companies at Windsor, Canada, outside of the United States. The pertinent part of the applicable statute is as follows:

> There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective

> date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. * * * In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

The issue arises in the following way: during the period from July 1, 1950, to October 30, 1950, freight charges were incurred by the plaintiffs on shipments of raw material, merchandize and other property transported on lines of The New York Central and Grand Trunk Western Railroad Companies from one point to another in continental United States. In payment of the freight charges the plaintiffs procured cashier's checks issued by the Michigan National Bank at Battle Creek, Michigan, payable to the Kellogg Company. These checks were endorsed at the Kellogg Company offices at Battle Creek, Michigan, as follows:

> Pay to the order of The New York Central Railroad [or the Grand Trunk Western Railroad Company],
>
> KELLOGG COMPANY,
> By E. O. ORCHARD,
> *Treasurer.*

Other similar checks were made payable to Kellogg Sales Company and similarly endorsed by that company. The Kellogg Sales Company was located at Detroit, Michigan, and was wholly owned by the Kellogg Company.

The freight bills comprising the total charges were listed

in letters prepared in duplicate, addressed to The New York Central Railroad or the Grand Trunk Western Railroad Company, as the case might be, in Windsor, Canada. Each letter containing a list of freight charges, together with freight bills and a check, was transmitted by mail from Battle Creek to the office of Kellogg Sales Company in Detroit, Michigan. Upon arrival at the Detroit office the letters, freight bills and checks were transported by Kathryn H. Wautelet by automobile to Windsor, Canada, and there delivered by her to the agent of the respective carriers. The agent acknowledged receipt of the endorsed cashier's checks in Windsor by signing a receipt at the end of a duplicate copy of the letter and delivering the copy to Miss Wautelet.

Kathryn H. Wautelet was employed by the Kellogg Company on July 31, 1950, and until October 31, 1950, expressly for the purpose of transporting and delivering the documents described above to the carriers at Windsor, Canada, for the taxpayer. She received a salary of $15 per week. She remained with the company from October 31 until December 31, 1950, performing minor clerical duties during the latter period. Her employment was terminated on December 31, 1950.

The plaintiffs concede that the payments were made in this manner to avoid the payment of the tax then imposed by section 3475 (a).

The railroads insisted upon collecting the transportation tax which was paid by the plaintiffs under protest. Timely claims for refund were filed by the plaintiffs with the Commissioner of Internal Revenue. The plaintiffs here seek a recovery of the taxes which they claim were illegally collected from them. The issue turns upon the proper construction and application of the taxing statute.

The plaintiffs insist that since the statute imposes the tax

on the amount paid within the United States, the delivery of the checks to agents of the transportation companies just beyond the borders of the United States renders the tax inapplicable, and therefore it should not have been collected.

We think when the statute is read as a whole and in its proper setting it becomes manifest that it was the intention of the Congress to levy the transportation tax on shipments wholly within continental United States.

In construing the 1939 statute the Commissioner of Internal Revenue in 1942 issued a press release stating that the tax did not apply to amounts paid outside the United States, regardless of where the transportation occurred. However, on July 7, 1950, the Commissioner of Internal Revenue issued a release in reference to the tax on transportation stating "there is no doubt that Congress intended to include all domestic shipments where all the transactions in connection with shipments of goods normally take place within the United States."

Effective November 1, 1950, the Congress amended section 3475 (a) of the act of 1939 to make clearer the terms of the 1939 act in respect to the tax on transportation charges.

In the report of the Senate Finance Committee on the Revenue Act of 1950, dealing with this particular provision, it states that its attention has been called to the fact that an increasing number of persons have been seeking to avoid the tax by various devices to pay the transportation charges outside of the United States. It quotes the press release which the Commissioner issued on July 7, 1950, to the effect that there is no doubt that Congress intended to tax all domestic shipments. The committee then makes this statement:

> While there has been considerable dispute as to the correctness of these interpretations of the law by the Commissioner it is your committee's view that these rulings are an accurate interpretation of existing law. • • •

The Senate report also contains this statement:

> To clarify the application of these taxes section 607 of your committee's bill adds provisions to the sections of the Internal Revenue Code imposing the taxes on transportation of persons and property (secs. 3469 and 3475) indicating that where the transportation both begins and ends in the United States, the taxes apply even though payment is made outside the United States. While the resulting increase over present collections under these taxes will be small, your committee's action forestalls the possibility of a substantial revenue loss in the future.

The Senate Committee Report then reiterates that the Commissioner of Internal Revenue had properly interpreted the intent of the Congress to impose a tax on transportation within the United States under the existing law and then states "the amendments are merely declaratory of existing law."

While the amendments were made effective after these particular shipments, we think it is the proper construction that the Congress intended by the original act to tax transportation within the United States of shipments of this character. To construe it otherwise would have led to the absurd result of inviting the escape from all such taxes by the simple device of carrying a check across the border and delivering it to an agent of the transportation company.

If a technical construction is to be invoked, there is serious doubt as to whether payment was actually made in Canada in these cases. The cashier's checks were issued within the United States; they were drawn on a bank within the United States; they were endorsed to the transportation companies within the United States. The checks were then delivered, with the transportation bills and an accompanying letter, by a person employed for the express purpose of taking the papers just across the border and securing a receipt for the checks. The checks were no doubt deposited and immediately

came back to the issuing bank for final payment. A check is merely an order on someone to transfer funds and a cashier's check is merely a guaranteed order. Neither is of any value except as it calls for the payment of funds. We have not the least doubt that if the bank upon which they were drawn had for any reason failed the transportation companies would have sued and recovered from the plaintiffs as the primary obligors and endorsers of the checks in question. *Cincinnati Oyster & Fish Co.* v. *National Lafayette Bank*, 36 N. E. 833, 46 Am. Stat. Rep. 560. "In the absence of circumstances indicating a contrary intention a cashier's check accepted from a debtor is not an absolute but merely a conditional payment, defeasible on nonpayment or dishonor." 40 Am. Jur. p. 768, sec. 77.

We doubt whether there is a single person who believes that Congress intended to exempt a man who walked across the border to deliver his check and at the same time to tax his neighbor who received the same service between the same points in this country, and who paid where the service was rendered without any attempt to avoid the tax. Legislation must be construed in its setting. At the time of its enactment Canada had a law which taxed transportation in that country, similarly. Congress, manifestly, instead of granting any exemption intended to close the gap and tax all transportation between points wholly within the United States. Evidently no thought was given to the possibility of a repeal of the Canadian tax and consequently no thought was given to the single phrase which plaintiff has undertaken to lift out of its context and construe as if it were the whole law.

Everyone admits, as it must be admitted, that Congress had no intention of granting such an exemption. There was, there is, no doubt that Congress intended to tax all transportation between points wholly within the United States.

We think that the method used was primarily a dodge for the manifest purpose of avoiding payment of a tax that was properly due. There is a degree of cleverness in the method. One is reminded of the Mother Goose rhyme of Little Jack Horner who, in eating his Christmas pie, "put in his thumb, pulled out a plum, and said * * * 'What a good boy am I.'"

I remember that even as a boy I was not sure that in doing this stunt Jack showed himself to be especially good. He had a motive. It was Christmastime. He could not afford not to be good.

In a disarming way the plaintiffs concede that their sole purpose was to avoid the payment of the taxes which would otherwise have been due. This is to their credit, although it would be difficult in any event to reach any other conclusion. It at least makes the issue clear and avoids the necessity of trying to see through a veil of subterfuge the truth about the whole matter, as courts are sometimes called upon to do. There was no thought or suggestion of subterfuge here, but an engaging frankness which is truly commendable.

We think for the reasons we have set out and which we regard as good and sufficient, the tax should have been collected and the plaintiffs should not recover.

The petition is dismissed.

LITTLETON, *Judge*, concurs.

WHITAKER, *Judge*, concurring:

I concur on the ground that payment was made within the United States.

LARAMORE, *Judge*, dissenting:

I respectfully dissent for the following reasons:

The terms of the statute under which the taxes were collected from plaintiffs are clear and unambiguous. When

Congress used the words "there shall be imposed upon the amount paid within the United States * * *," it is susceptible of only one meaning. In the absence of ambiguity, courts cannot go behind the act in order to give it another and different meaning. The interpretive ruling of the Commissioner, dated December 7, 1942, wherein he stated:

> The tax does not apply to the amount paid for the transportation of property * * * (c) when paid outside the United States, regardless of where the transportation occurs;[1]

was consistent with the regulations promulgated by the Commissioner in 1943. The pertinent portions of such regulations are as follows:

> Reg. 113, Sec. 143.11. *Scope of Tax.*—Section 3475 (a) imposes a tax *upon amounts paid within the United States* after December 1, 1942, to a person engaged in the business of transporting property for hire, for transportation, originating on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another.
>
> Reg. 113, Sec. 143.13. *Application of Tax.* * * * The tax applies to the total *amount paid within the United States* for transportation of property from one point in the United States to another even though while enroute part of the transportation movement is through a foreign country.

The Commissioner's regulations, adopted to conform with the 1950 amendment of the taxing statute, expressly recognized that the tax applies to amounts paid without the United States only on and after November 1, 1950, the effective date of the 1950 amendment. These regulations provide as follows:

> *Scope of Tax.* Section 3475 (a) imposes a tax upon (a) amounts *paid within* the United States after December 1, 1942, for transportation originating on or

1. Mim. 5447, December 7, 1942, 1942-2 Cumulative Bulletin 280.

after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another, and (b) amounts paid *without* the United States, *on or after November 1, 1950,* for transportation originating on or after such date; of property by rail, motor vehicle, water, or air from one point in the United States to another. The tax applies only to amounts paid to a person engaged in the business of transporting property for hire. [1951–1 Cum. Bull. 148, 149.]

* * * * *

With respect to amounts paid within the United States, the tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after such date. * * *

With respect to amounts *paid without* the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date.

The Supreme Court, in the case of *Gould* v. *Gould,* 245 U. S. 151, 153, said:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

In a more recent case of *United States* v. *Olympic Radio and Television, Inc.,* decided May 23, 1955, the Supreme Court said: "* * * We can only take the Code as we find it and give it as great an internal symmetry and consistency as its words permit."

Why Congress employed the words "paid within the United States," we do not know. It may have been because Canada also had a similar tax until 1949 when it was repealed. While the Canadian tax was in effect, there could have been no tax avoidance reason for a shipper of merchandise within the United States to physically pay the

transportation cost in Canada. Upon repeal of the Canadian tax, it became possible for shippers to avoid the United States excise tax by payment in Canada. Congress recognized this loophole and closed it shortly thereafter by amending this statute.

The physical delivery of the cashiers' checks was clearly payment without the United States within the meaning of section 3475 (a) of the Internal Revenue Code.

I would permit plaintiffs to recover.

MADDEN, *Judge*, joins in the foregoing dissent.

FINDINGS OF FACT.

The court, having considered the facts as stipulated by the parties, and the briefs and argument of counsel, makes findings of fact as follows:

1. During the period from July 31, 1950, to October 30, 1950, inclusive, Kellogg Company incurred freight charges on shipments to it via The New York Central Railroad of raw materials and other goods purchased by Kellogg Company and used in the manufacture and distribution of its products. Such purchases were made f. o. b. the points of shipment, and the freight charges accordingly were an obligation of Kellogg Company. The freight charges together with the 3 percent tax imposed by section 3475 (a) of the Internal Revenue Code of 1939, as amended, § 620 (a), 56 Stat. 979, are set forth in the following schedule:

Date—1950	Freight	Tax	Total
July 31	$3,559.45	$95.53	$3,654.98
Aug. 1	1,778.23	53.34	1,831.57
Aug. 2	3,176.88	78.94	3,255.82
Aug. 3	4,293.47	128.80	4,422.27
Aug. 4	11,556.93	341.32	11,898.25
Aug 7	2.52	.08	2.60
Aug. 8	4,342.66	130.26	4,472.92
Aug. 9	7,895.86	236.88	8,132.74
Aug. 10	4,307.49	79.03	4,386.52
Aug. 11	1,794.70	53.84	1,848.54
Aug. 14	6,251.06	187.16	6,438.22
Aug. 15	5,999.27	171.41	6,170.68

Date—1950	Freight	Tax	Total
Aug. 16	2,997.69	89.92	3,087.61
Aug. 17	8,318.03	249.58	8,567.61
Aug. 18	18,714.20	540.11	19,254.31
Aug. 21	6,397.68	193.14	6,590.82
Aug. 22	2,588.33	77.65	2,665.98
Aug. 23	5,912.50	177.39	6,089.89
Aug. 24	6,904.49	207.14	7,111.63
Aug. 25	2,975.17	83.95	3,059.12
Aug. 28	7,851.10	235.43	8,086.53
Aug. 29	11,812.76	354.38	12,167.14
Aug. 30	5,756.76	146.81	5,903.57
Aug. 31	9,346.11	263.72	9,609.83
Sept. 1	5,398.91	161.96	5,560.87
Sept. 5	3,925.41	117.77	4,043.18
Sept. 6	2,155.47	64.66	2,220.13
Sept. 7	7,706.13	231.19	7,937.32
Sept. 8	5,053.37	151.60	5,204.97
Sept. 11	4,078.84	122.31	4,201.15
Sept. 12	23,587.64	707.65	24,295.29
Sept. 13	7,080.41	200.85	7,281.26
Sept. 15	2,257.61	62.97	2,320.58
Sept. 18	1,793.83	53.80	1,847.63
Sept. 19	1,255.82	37.68	1,293.50
Sept. 20	5,158.31	135.39	5,293.70
Sept. 21	1,871.16	56.14	1,927.30
Sept. 22	1,066.30	27.35	1,093.65
Sept. 25	268.94	8.07	277.01
Sept. 26	1,555.76	32.54	1,588.30
Sept. 28	8,104.59	243.02	8,347.61
Sept. 29	1,639.11	49.17	1,688.28
Oct. 2	1,545.80	46.36	1,592.16
Oct. 3	531.31	15.94	547.25
Oct. 4	1,874.34	40.18	1,914.52
Oct. 5	1,697.01	50.90	1,747.91
Oct. 6	1,260.68	21.56	1,282.24
Oct. 9	5,464.28	158.57	5,622.85
Oct. 10	917.79	21.19	938.98
Oct. 11	994.07	29.82	1,023.89
Oct. 12	4,938.49	128.50	5,066.99
Oct. 13	726.76	6.85	733.61
Oct. 16	1,312.56	39.38	1,351.94
Oct. 17	1,686.67	29.32	1,715.99
Oct. 18	2,791.82	83.76	2,875.58
Oct. 20	3,919.18	98.11	4,017.29
Oct. 23	5,822.98	174.68	5,997.66
Oct. 24	14,528.92	435.85	14,964.77
Oct. 25	6,780.53	203.39	6,983.92
Oct. 26	1,567.85	21.29	1,589.14
Oct. 27	2,291.29	64.18	2,355.47
Total	289,143.28	8,309.76	297,453.04

2. Payment of the freight charges and tax totaling $3,654.98, set forth as the first item in the schedule incorporated in finding 1 hereof, was made by Kellogg Company in the following manner:

a. The freight bills comprising the total charges set forth in the first item were listed in a letter addressed to The New York Central Railroad, Windsor, Ontario, by the Kellogg Company, which read in pertinent part as follows:

"We contend that the 3 percent excise tax should not be imposed or collected with respect to each and every of the foregoing bills, because payment thereof is being made by the undersigned without the United States, but under the press release of July 7, 1950 (S–2389) the United States Commissioner of Internal Revenue states that such tax will apply to all shipments between two points in the United States, and your railroad refuses to accept payment of such freight bills in Canada unless the 3 percent excise tax is paid thereon.

"It is the intention of the undersigned to file appropriate claim for refund of the 3 percent tax paid upon the amount of the above bills."

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Company, payable to itself, in the amount of $3,654.98.

c. This check was indorsed at Kellogg Company's office at Battle Creek, Michigan, as follows:

Pay to the Order of The
New York Central Railroad,
KELLOGG COMPANY,
By: /s/ E. O. ORCHARD,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the indorsed check were transmitted by United States mail to the Detroit, Michigan, office of Kellogg Sales Company, the wholly-owned sales subsidiary of Kellogg Company.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and indorsed check were transported by Kathryn H. Wautelet, the bearer designated in the letter, via automobile, to Windsor, Ontario, Canada, and there delivered by her to the agent of The New York Central Railroad.

f. The agent of said railroad acknowledged receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the accompanying letter, with the 3 percent excise tax thereon, by signing a receipt at the end of the duplicate copy of the letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to Kellogg Company's office at Battle Creek, Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

3. During the period from July 31, 1950, to October 30, 1950, inclusive, Kellogg Sales Company incurred freight charges on shipments of its products via The New York Central Railroad. Such freight charges were prepaid by Kellogg Sales Company because the selling price of its merchandise is a delivered price to its customers. These charges together with the 3 percent tax imposed by section 3475 (a) of the Internal Revenue Code of 1939, as amended, § 620 (a), 56 Stat. 979, are set forth in the following schedule:

Date 1950	Freight	Tax	Total
July 31	$10,731.07	$307.71	$11,038.78
Aug. 1	9,123.99	273.71	9,397.70
Aug. 2	9,224.81	276.76	9,501.57
Aug. 3	14,150.30	424.53	14,574.83
Aug. 4	7,740.67	232.23	7,972.90
Aug. 7	10,943.98	319.69	11,263.67
Aug. 8	11,671.46	339.66	12,011.12
Aug. 9	9,040.04	269.97	9,310.01
Aug. 10	9,587.93	287.63	9,875.56
Aug. 11	9,611.72	281.33	9,893.05
Aug. 14	7,509.60	225.31	7,734.91
Aug. 15	9,852.88	283.15	10,136.03
Aug. 16	8,891.64	264.70	9,156.34
Aug. 17	17,899.60	537.04	18,436.64
Aug. 18	6,660.47	193.12	6,853.59
Aug. 21	6,320.20	174.40	6,494.60
Aug. 22	8,440.66	250.80	8,691.46
Aug. 23	4,491.13	134.74	4,625.87
Aug. 24	9,677.26	271.95	9,949.21
Aug. 25	9,427.43	275.59	9,703.02
Aug. 28	8,724.02	241.31	8,965.33
Aug. 29	7,422.79	219.06	7,641.85
Aug. 30	9,256.19	277.66	9,533.85

Date 1950	Freight	Tax	Total
Aug. 31	6,884.24	203.27	7,087.51
Sept. 1	6,995.76	199.81	7,195.57
Sept. 5	7,644.99	229.35	7,874.34
Sept. 6	5,777.67	173.30	5,950.97
Sept. 7	6,836.66	197.66	7,034.32
Sept. 8	11,225.76	336.72	11,562.48
Sept. 11	8,576.79	236.13	8,812.92
Sept. 12	7,864.35	235.95	8,100.30
Sept. 13	3,246.86	97.41	3,344.27
Sept. 14	9,502.62	285.07	9,787.69
Sept. 15	6,415.86	188.90	6,604.76
Sept. 18	6,166.93	181.22	6,348.15
Sept. 19	7,616.50	213.26	7,829.76
Sept. 20	5,379.16	161.37	5,540.53
Sept. 21	9,693.28	281.63	9,974.91
Sept. 22	5,864.60	152.52	6,017.12
Sept. 25	5,924.67	177.74	6,102.41
Sept. 26	4,701.55	141.06	4,842.61
Sept. 27	7,835.79	235.09	8,070.88
Sept. 28	16,821.51	465.10	17,286.61
Sept. 29	9,816.75	294.48	10,111.23
Oct. 2	7,997.86	217.29	8,215.15
Oct. 3	11,733.27	352.02	12,085.29
Oct. 4	11,695.90	332.54	12,028.44
Oct. 5	11,331.52	316.98	11,648.50
Oct. 6	12,436.66	357.70	12,794.36
Oct. 9	13,172.20	385.92	13,558.12
Oct. 10	10,370.37	301.96	10,672.33
Oct. 11	8,422.51	243.49	8,666.00
Oct. 12	11,360.96	337.20	11,698.16
Oct. 13	13,863.32	412.38	14,275.70
Oct. 16	7,857.69	222.29	8,079.98
Oct. 17	11,401.48	332.88	11,734.36
Oct. 18	9,730.52	291.92	10,022.44
Oct. 19	11,677.12	337.37	12,014.49
Oct. 20	7,858.64	229.38	8,088.02
Oct. 23	6,355.65	177.62	6,533.27
Oct. 24	8,507.34	255.25	8,762.59
Oct. 25	8,278.41	239.17	8,517.58
Oct. 26	8,810.99	230.06	9,041.05
Oct. 27	7,762.75	229.16	7,991.91
Oct. 30	8,273.24	244.78	8,518.02
Total	$586,090.54	$17,096.45	$603,186.99

4. Payment of the freight charges and tax totaling $11,038.78, set forth as the first item in the schedule incorporated in finding 3 hereof was made by Kellogg Sales Company in the following manner:

a. The freight bills comprising the total charges set forth in the first item were listed in a letter addressed to The New York Central Railroad, Windsor, Ontario. The letter contained the same statements as have been quoted in finding 2a.

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Sales Company, payable to itself, in the amount of $11,038.78.

c. The check was indorsed at the office of Kellogg Sales Company at Battle Creek, Michigan, as follows:

Pay to the order of The
New York Central Railroad,
KELLOGG SALES COMPANY,
By: /s/ E. O. ORCHARD,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the indorsed check were transmitted by United States mail to the sales office of Kellogg Sales Company in Detroit, Michigan.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and indorsed check were transported by Kathryn H. Wautelet, the bearer designated in the letter, via automobile, to Windsor, Ontario, Canada, and there delivered by her to the agent of The New York Central Railroad.

f. The agent of that railroad acknowledged receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the accompanying letter, with the 3 percent excise tax thereon, by signing a receipt at the end of the duplicate copy of the letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to the office of Kellogg Sales Company at Battle Creek, Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

5. During the period from July 31, 1950, to October 30, 1950, inclusive, Kellogg Company incurred freight charges on shipments to it via the Grand Trunk Western Railroad Company of raw materials and other goods purchased by Kellogg Company and used in the manufacture and distribution of its products. Such purchases were made f. o. b.

the points of shipment, and the freight charges accordingly were an obligation of Kellogg Company. These charges together with the 3 percent tax imposed by section 3475 (a) of the Internal Revenue Code of 1939, as amended, § 620 (a), 56 Stat. 979, are set forth in the following schedule:

Date 1950	Freight	Tax	Total
July 31	$4,443.48	$103.26	$4,546.74
Aug. 1	1,787.94	30.57	1,818.51
Aug. 2	4,198.54	95.94	4,294.48
Aug. 3	6,986.25	186.86	7,173.11
Aug. 4	2,972.60	72.23	3,044.83
Aug. 8	2,082.88	51.57	2,134.45
Aug. 9	5,355.52	117.96	5,473.48
Aug. 10	5,389.72	131.62	5,521.34
Aug. 11	651.76	13.85	665.61
Aug. 14	327.68	3.08	330.76
Aug. 15	2,772.65	83.18	2,855.83
Aug. 16	7,827.78	158.61	7,986.39
Aug. 17	2,972.83	77.76	3,050.59
Aug. 18	3,184.26	73.92	3,258.18
Aug. 31	8,380.34	244.95	8,625.29
Sept. 1	3,636.89	103.77	3,740.66
Sept. 5	11,011.86	319.04	11,330.90
Sept. 7	12,519.00	341.75	12,860.75
Sept. 8	9,163.46	264.74	9,428.20
Sept. 11	1,952.29	53.22	2,005.51
Sept. 13	4,326.51	111.35	4,437.86
Sept. 15	1,302.31	28.86	1,331.17
Sept. 19	520.20	5.23	525.43
Sept. 20	2,728.25	69.79	2,798.04
Sept. 21	1,480.50	44.41	1,524.91
Sept. 22	3,975.48	83.74	4,059.22
Sept. 25	1,045.06	31.35	1,076.41
Sept. 26	581.49	17.44	598.93
Sept. 27	3,916.37	93.41	4,009.78
Sept. 28	2,691.54	80.74	2,772.28
Sept. 29	844.69	25.35	870.04
Oct. 2	1,321.14	14.97	1,336.11
Oct. 3	1,747.06	27.57	1,774.63
Oct. 4	5,047.50	120.26	5,167.76
Oct. 5	2,143.66	53.87	2,197.53
Oct. 6	746.63	22.40	769.03
Oct. 9	751.94	10.30	762.24
Oct. 10	1,340.33	40.21	1,380.54
Oct. 11	3,420.72	97.46	3,518.18
Oct. 13	2,556.84	62.56	2,619.40
Oct. 16	2,666.06	67.33	2,733.39
Oct. 17	1,783.71	37.40	1,821.11
Oct. 18	5,765.94	142.14	5,908.08
Oct. 19	1,455.22	29.27	1,484.49
Oct. 23	567.91	11.83	579.74
Oct. 24	2,294.11	63.40	2,357.51
Oct. 25	3,374.88	83.25	3,458.13
Oct. 26	1,136.65	23.96	1,160.61
Oct. 27	2,592.78	71.20	2,663.98
Oct. 30	2,262.98	60.55	2,323.53
Total	164,006.19	4,159.48	168,165.67

6. Payment of the freight charges and tax totaling $4,546.74 set forth as the first item in the foregoing schedule was made by Kellogg Company in the following manner:

a. The freight bills comprising the total charges set forth as the first item were listed in a letter addressed to the Grand Trunk Western Railroad Company, Windsor, Ontario. The letter contained the same statements as have been quoted in finding 2a.

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Company, payable to itself, in the amount of $4,546.74.

c. The check was indorsed at Kellogg Company's office at Battle Creek, Michigan, as follows:

Pay to the order of the Grand
Trunk Western Railroad Company,
KELLOGG COMPANY,
By: /s/ E. O. ORCHARD,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the endorsed check were transmitted by United States mail to the Detroit, Michigan, office of Kellogg Sales Company, the wholly-owned sales subsidary of Kellogg Company.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and endorsed check were transported by Kathryn H. Wautelet, the bearer designated in the letter, via automobile, to Windsor, Ontario, Canada, and there delivered by her to the agent of the Grand Trunk Western Railroad Company.

f. The agent of that railroad acknowledged receipt of the endorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the letter, with the 3 percent excise tax thereon, by signing a receipt at the end of the duplicate copy of such letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to Kellogg Company's office at Battle Creek,

Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

7. During the period from July 31, 1950, to October 30, 1950, inclusive, Kellogg Sales Company incurred freight charges on shipments of its products via the Grand Trunk Western Railroad Company. Such freight charges were prepaid by Kellogg Sales Company because the selling price of its merchandise is a delivered price to its customers. These charges together with the 3 percent tax imposed by section 3475 (a) of the Internal Revenue Code of 1939, as amended, § 620 (a), 56 Stat. 979, are set forth in the following schedule:

Date 1950	Freight	Tax	Total
July 31	$6,946.26	$208.44	$7,154.70
Aug. 1	7,887.93	228.74	8,116.67
Aug. 2	9,319.91	270.89	9,590.80
Aug. 3	3,709.46	96.45	3,805.91
Aug. 4	7,841.42	230.97	8,072.39
Aug. 7	5,882.44	176.49	6,058.93
Aug. 8	3,095.20	89.35	3,184.55
Aug. 9	14,466.55	433.68	14,900.23
Aug. 10	3,024.37	90.75	3,115.12
Aug. 11	6,850.24	205.51	7,055.75
Aug. 14	7,609.96	228.29	7,838.25
Aug. 15	5,526.66	160.48	5,687.14
Aug. 16	12,244.16	364.68	12,608.84
Aug. 17	7,237.93	217.18	7,455.11
Aug. 18	5,433.60	163.01	5,596.61
Aug. 31	6,080.15	182.42	6,262.57
Sept. 1	3,723.80	111.72	3,835.52
Sept. 5	7,610.38	213.50	7,823.88
Sept. 6	6,065.60	180.86	6,246.46
Sept. 7	8,533.95	238.16	8,772.11
Sept. 8	708.95	21.28	730.23
Sept. 11	4,582.04	128.29	4,710.33
Sept. 13	7,654.56	215.91	7,870.47
Sept. 14	1,655.97	49.55	1,705.52
Sept. 15	5,684.91	156.81	5,841.72
Sept. 18	5,151.03	154.53	5,305.56
Sept. 19	5,281.58	148.95	5,430.53
Sept. 20	8,009.10	234.97	8,244.07
Sept. 21	1,694.00	50.80	1,744.80
Sept. 22	3,834.48	113.76	3,948.20
Sept. 25	4,929.41	147.89	5,077.34
Sept. 26	6,147.31	175.33	6,322.64
Sept. 27	6,171.72	185.16	6,356.88
Sept. 28	2,700.85	81.02	2,781.87
Sept. 29	2,955.91	88.67	3,044.58

Date 1950	Freight	Tax	Total
Oct. 2	2,112.81	63.40	2,176.21
Oct. 3	1,957.92	58.75	2,016.67
Oct. 4	1,863.60	55.92	1,919.52
Oct. 5	1,187.58	35.64	1,223.22
Oct. 6	1,959.71	58.79	2,018.50
Oct. 9	2,407.80	71.87	2,479.67
Oct. 10	1,654.27	49.64	1,703.91
Oct. 11	5,290.16	158.71	5,448.87
Oct. 13	2,210.23	66.32	2,276.55
Oct. 16	2,707.51	77.91	2,785.42
Oct. 17	2,207.30	65.87	2,273.17
Oct. 18	2,585.57	77.59	2,663.16
Oct. 19	2,266.37	67.99	2,334.36
Oct. 20	4,656.50	138.51	4,795.01
Oct. 23	3,334.20	100.03	3,434.23
Oct. 24	3,716.78	111.50	3,828.28
Oct. 25	3,929.76	117.89	4,047.65
Oct. 26	2,099.63	62.96	2,162.59
Oct. 27	1,311.24	39.35	1,350.59
Oct. 30	5,262.57	143.78	5,406.35
Total	260,973.30	7,666.91	268,640.21

8. Payment of the freight charges and tax totaling $7,154.70, set forth as the first item in the foregoing schedule was made by Kellogg Sales Company in the following manner:

a. The freight bills comprising the total charges set forth in the first item were listed in a letter addressed to the Grand Trunk Western Railroad Company in Windsor, Ontario. The letter contained the same statements that have been quoted in finding 2a.

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Sales Company, payable to itself, in the amount of $7,154.70.

c. This check was indorsed at the office of Kellogg Sales Company at Battle Creek, Michigan, as follows:

Pay to the order of the Grand
Trunk Western Railroad Company,
KELLOGG SALES COMPANY,
By: /s/ E. O. ORCHARD,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the indorsed check were transmitted by

United States mail to the sales office of Kellogg Sales Company in Detroit, Michigan.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and indorsed check were transported by Kathryn H. Wautelet, the bearer designated in the letter, via automobile, to Windsor, Canada, and there delivered by her to the agent of the Grand Trunk Western Railroad Company.

f. The agent of that railroad acknowledged receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the accompanying letter, with the 3 percent excise tax thereon, by signing a receipt at the end of the duplicate copy of the letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to the office of Kellogg Sales Company at Battle Creek, Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

9. Kathryn H. Wautelet was employed by Kellogg Company on or about July 31, 1950, expressly for the purpose of transporting and delivering on behalf of Kellogg Company (and its wholly owned sales subsidiary, Kellogg Sales Company), to the agents of The New York Central Railroad and the Grand Trunk Western Railroad Company in Windsor, Canada, letters, freight bills and indorsed cashier's checks as described in findings 2, 4, 6, and 8 hereof. Her employment for this special purpose was required because the task of transporting and delivering these items consumed a considerable amount of time, and there was no other available employee of Kellogg Company (or of its subsidiary, Kellogg Sales Company) who could be assigned to this job.

To and including October 31, 1950, Kathryn H. Wautelet was employed by Kellogg Company for the aforesaid purpose. She received a salary of $15 per week during this

entire period. She reported to the Detroit, Michigan, office of Kellogg Sales Company as her place of employment.

From November 1, 1950, to December 31, 1950, Kellogg Company continued Miss Wautelet in its employ to perform minor clerical duties for it and its subsidiary, Kellogg Sales Company. Her salary was $15 per week and she worked at the Detroit, Michigan, office of Kellogg Sales Company. Her employment was terminated on December 31, 1950.

10. Payment of the freight charges and taxes constituting each and every of the items (in addition to the first item) of the schedule set forth in finding 1 hereof was effected in a manner identical to that described in finding 2 hereof including subparagraphs 2a to 2g. Payment of the freight charges and taxes constituting each and every of the items (in addition to the first item) of the schedule set forth in finding 3 hereof was effected in a manner identical to that described in finding 4 hereof including subparagraphs 4a to 4g. Payment of the freight charges and taxes constituting each and every of the items (in addition to the first item) of the schedule set forth in finding 5 hereof was effected in a manner identical to that described in finding 6 hereof including subparagraphs 6a to 6g. Payment of the freight charges and taxes constituting each and every of the items (in addition to the first item) of the schedule set forth in finding 7 hereof was effected in a manner identical to that described in finding 8 hereof including subparagraphs 8a to 8g. The transportation to, and delivery in Windsor, Canada, of the duplicate letters, freight bills, and indorsed cashier's checks used to pay such freight charges and taxes were accomplished in each instance by the same Kathryn H. Wautelet described in finding 9 hereof. Plaintiffs have in their possession the duplicate letter relating to each of the items comprising the schedules set forth in findings 1, 3, 5, and 7 hereof, and the accompanying customer's copy of the

cashier's check used in payment of the freight charges and taxes itemized therein. Each such duplicate letter bears the signed receipt of the agent of The New York Central Railroad or the agent of the Grand Trunk Western Railroad Company acknowledging receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in such letter, with the 3 percent excise tax thereon.

11. During the period from July 31, 1950, to October 30, 1950, inclusive, the main business office of Kellogg Company was situated at Battle Creek, Michigan. Kellogg Company did not maintain an office in Detroit, Michigan, or in Windsor, Canada.

During the period from July 31, 1950, to October 30, 1950, inclusive, the main business office of Kellogg Sales Company was situated in Battle Creek, Michigan. For many years prior to and during that period Kellogg Sales Company regularly maintained a sales office at Detroit, Michigan, and continues to maintain such an office at the present date. Kellogg Sales Company did not maintain an office in Windsor, Canada, during the aforesaid period from July 31, 1950, to October 30, 1950.

The payment of the freight charges set forth in these findings to agents of the respective railroads at Windsor, Canada, was not made for any business purpose other than to avoid payment of the tax imposed at that time by section 3475 (a) of the Internal Revenue Code of 1939, as amended.

12. Each of the shipments described in findings 1 and 5 hereof originated at some point in the continental United States and was destined for Kellogg Company's plant at Battle Creek, Michigan.

Each of the shipments described in findings 3 and 7 hereof originated at Battle Creek, Michigan, and was destined for a customer of Kellogg Sales Company situated in some part of the continental United States.

13. No repayment of any of the taxes set forth in the schedules in findings 1, 3, 5, and 7 hereof, or any part of such taxes, ever has been made to the plaintiffs by either of the railroads collecting the same, nor have the plaintiffs otherwise recovered such taxes or any part thereof. The plaintiffs have not consented to the allowance of credit or refund of such taxes in whole, or in part, to either of said railroads.

14. No action on the claims set forth in the above entitled proceedings other than those mentioned in the petitions filed herein has been taken before the Congress of the United States or before any department of the Government.

Conclusion of Law.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law, that the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 449

KELLOGG COMPANY, KELLOGG SALES COMPANY,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the Court of Claims (Pet. 9-18) are reported at 133 F. Supp. 387.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1955. The petition for a writ of certiorari was filed on October 5, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Whether petitioners were required by Section 3475(a) of the Internal Revenue Code of 1939 to pay transportation taxes on shipments of property which were made entirely within the United States by carriers within the United States, but which were paid for by checks delivered to the transportation companies across the border in Canada for the sole purpose of avoiding these taxes.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 3475 [As added by Sec. 620 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798].
>
> TRANSPORTATION OF PROPERTY.
>
> (a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect

to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

STATEMENT

This is a suit for refund of transportation taxes paid under Section 3475(a) of the 1939 Internal Revenue Code. The facts as found by the Court of Claims may be summarized as follows (Pet. 18-31):

During the period from July 31, 1950, to October 30, 1950, the Kellogg Company and its subsidiary, Kellogg Sales Company, petitioners here, incurred freight charges on shipments which were made either to them or by them via the New York Central and Grand Trunk Western Railroads (Pet. 18-26).

The shipments which were made to the Kellogg Company originated at some point in the continental United States and were destined for its plant at Battle Creek, Michigan, and the shipments of the Kellogg Sales Company, which originated at Battle Creek, were sent to customers situated in

some part of the continental United States (Pet. 30).

Checks in payment of the freight charges and taxes thereon were delivered to the agents of the New York Central Railroad and the Grand Trunk Western Railroad Company in Windsor, Canada, by Kathryn H. Wautelet, who was employed by the Kellogg Company on or about July 31, 1950, expressly for the purpose of transporting and delivering, on its own behalf and that of its subsidiary, such checks with letters and freight bills (Pet. 28).

The procedure for making these payments was similar in each instance, and is described in the lower court's Finding 2 as follows (Pet. 20-21, 29-30):

> a. The freight bills comprising the total charges set forth in the first item were listed in a letter addressed to The New York Central Railroad, Windsor, Ontario, by the Kellogg Company, which read in pertinent part as follows:
>
> "We contend that the 3 percent excise tax should not be imposed or collected with respect to each and every of the foregoing bills, because payment thereof is being made by the undersigned without the United States, but under the press release of July 1, 1950 (S-2389) the United States Commissioner of Internal Revenue states that such tax will apply to all shipments between two points in the United States,

and your railroad refuses to accept payment of such freight bills in Canada unless the 3 percent excise tax is paid thereon.

"It is the intention of the undersigned to file appropriate claim for refund of the 3 percent tax paid upon the amount of the above bills."

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Company, payable to itself, in the amount of $3,654.98.

c. This check was indorsed at Kellogg Company's office at Battle Creek, Michigan, as follows:

Pay to the Order of The
New York Central Railroad,
Kellogg Company,
By: (S.) E. O. Orchard,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the indorsed check were transmitted by United States mail to the Detroit, Michigan, office of Kellogg Sales Company, the wholly-owned sales subsidiary of Kellogg Company.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and indorsed check were transported by Kathryn H. Wautelet, the bearer

designated in the letter, via automobile, to Windsor, Ontario, Canada, and there delivered by her to the agent of The New York Central Railroad.

f. The agent of said railroad acknowledged receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the accompanying letter, with the 3 per cent excise tax thereon, by signing a receipt at the end of the duplicate copy of the letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to Kellogg Company's office at Battle Creek, Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

During the period from July 31, 1950, to October 30, 1950, the main offices of both the Kellogg Company and the Kellogg Sales Company were situated at Battle Creek, Michigan, but the Kellogg Sales Company also maintained an office at Detroit, Michigan. (Pet. 30.)

The payment of the freight charges to the railroad agents at Windsor, Canada, was not made for any purpose other than to avoid payment of the tax imposed by Section 3475(a) of the Internal Revenue Code of 1939. (Pet. 30.)

Upon the foregoing findings of fact the Court of Claims concluded that as a matter of law the

petitioners were not entitled to recover, and dismissed their petition. (Pet. 31.)

ARGUMENT

The Court of Claims correctly held that petitioners were required under Section 3475(a) of the 1939 Internal Revenue Code, *supra*, pp. 2-3, to pay transportation taxes on shipments which were (1) made entirely within the United States, by transportation companies within the United States, and (2) paid for by checks drawn on a bank within the United States. Petitioners' effort to escape the tax by delivering the checks across the border in Canada for the exclusive purpose of tax avoidance presents the first occasion on which this narrow problem has arisen. Stripped of any possible future importance by the amendment of Section 3475(a) effective November 1, 1950, the issue thus presented is plainly unworthy of certiorari.

Prior to its amendment in 1950, Section 3475(a) imposed a tax "upon the amount paid within the United States" for transportation wholly within the United States, or for that portion of the transportation within the United States where property was carried "from a point without the United States to a point within the United States * * *." As the court below observed (Pet. 13-14, 15), it is at least seriously questionable whether petitioners succeeded in escaping even the literal terms of the isolated phrase ("amount paid within the United States") they invoke when, for the single purpose of avoiding the tax, they hired a woman to deliver

over the border checks drawn on banks within the United States, payable to transportation companies within the United States, for transportation wholly within the United States. But it seems clear, wholly apart from the niceties of negotiable instruments law, that Congress intended to reach payments like these and that the effort to find a loophole in the reference to "the amount paid within the United States" was properly defeated by the court below. Section 3475(a) was enacted in 1942 as an added source of wartime revenue. Nothing in this setting [1] or in the character of the transactions Congress undertook to tax leaves room for petitioners' conclusion, as stated by the court below (Pet. 14), "that Congress intended to exempt a man who walked across the border to deliver his check and at the same time to tax his neighbor who received the same service between the same points in this country, and who paid where the service was rendered without any attempt to avoid the tax."

When Congress amended the statute in 1950, to erase even the semantic doubt on which petitioners build their case,[2] it confirmed the view adopted by the court below, noting an earlier ad-

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[1] "* * * we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress." *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 273; see also *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72, 79.

[2] Section 607(b) of the Revenue Act of 1950, c. 994, 64 Stat. 906, 966, amended Section 3475(a) of the 1939 Code to apply to any "amount paid within *or without* the United States" (emphasis added).

ministrative construction to the same effect. In its Report, the Senate Finance Committee, which had added this amendment to the proposed House bill, declared (S. Rep. No. 2375, 81st Cong., 2d Sess., p. 25 (1950-2 Cum. Bull. 483, 502)):

> (F) TRANSPORTATION OF PERSONS AND PROPERTY WHERE AMOUNTS ARE PAID OUTSIDE OF THE UNITED STATES
>
> The attention of your committee has been called to the fact that an increasing number of persons have been seeking to avoid the 15 percent tax on the transportation of persons and the 3 percent tax on the transportation of property by using various devices to pay the transportation charges outside of the United States. This practice has been increasing rapidly since the repeal of the Canadian tax on the transportation of persons in March of 1949. Many believed that payments outside the United States for transportation within the United States were tax-free because the sections levying these taxes (sec. 3469 (a) and (c) and sec. 3475 (a)) refer to "amounts paid within the United States." * * *
>
> In a release on July 7, 1950, the Commissioner stated in the case of the tax on the transportation of property—
>
> there is no doubt that Congress intended to include all domestic shipments where all the transactions in connection with shipments of

> goods normally take place within the United States.
>
> While there has been considerable dispute as to the correctness of these interpretations of the law by the Commissioner it is your committee's view that these rulings are an accurate interpretation of existing law. * * *
>
> To clarify the application of these taxes section 607 of your committee's bill adds provisions to the sections of the Internal Revenue Code imposing the taxes on transportation of persons and property (secs. 3469 and 3475) indicating that where the transportation both begins and ends in the United States, the taxes apply even though payment is made outside the United States. * * *

Again, in its detailed discussion of the specific amendments, the same Report stated (p. 135, 1950-2 Cum. Bull. 483, 579):

> Section 3475(a) of the Code now imposes a tax upon the amount paid within the United States for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another. Under the amendment the tax would be applicable to such amounts paid for the transportation of property, whether the payment is made within or without the United States.
>
> The Commissioner of Internal Revenue has issued press releases which indicate that the

> Bureau is taking a position in accordance with the intent of Congress to impose the tax on transportation within the United States in cases where attempts are made to avoid the tax by unusual methods purporting to make payment outside of the United States. It is your committee's view that the position of the Bureau properly applies existing law, and, therefore, that with respect to the situations covered by the press releases, the amendments are merely declaratory of existing law. * * *

These expressions when the statute was amended are, of course, not decisive on its meaning prior to the amendment. They do add authoritative weight to the wholly sensible construction adopted by the Court of Claims. And they highlight the critical point that petitioners' tax avoidance device, litigated so far in only this single case, has no prospective significance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 449

KELLOGG COMPANY,
KELLOGG SALES COMPANY,
Petitioners,

vs.

THE UNITED STATES.

REPLY BRIEF FOR PETITIONERS.

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THE DARTNELL-BLEDSOE PRINTING COMPANY, CHICAGO

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REPLY BRIEF FOR PETITIONERS.

Petitioners are impelled to file this reply brief because the brief in opposition filed by the United States erroneously contends that there is no issue warranting certiorari.

The brief in opposition (p. 8) states that the court below "properly defeated" the loophole in the statutory phrase imposing the tax only on "the amount paid within the United States." The important point is that it was not the function of the court below, or of any court, to plug a loophole in a tax statute, and thereby impose a tax by judicial construction. The separation of powers designed by the framers of the constitution designates the legislature as the taxing body—not the judiciary (U. S. Const., Art. I, Sec. 8, Cl. 1).

If Congress had sought to tax payments made *within* and *without* the United States when it enacted the prop-

erty transportation tax in 1942, it could have done so with ease. No difficulty was encountered in choosing appropriate language to amend the statute in 1950, and there is nothing obscure or abstruse about the word *within*.

The reference in the opposition brief (p. 8) to checks "payable to transportation companies within the United States" is without support in the record. The checks were delivered to transportation companies outside the United States at offices maintained by each of those companies in Canada.[1]

The adherance of this Court to the inviolability of the constitutional separation of powers is by now a matter of history (*Hepburn* v. *Griswold*, 8 Wall. 611, 19 L. Ed. 513). The decision of the court below contravenes this doctrine, deprives the petitioners of a substantial amount of money, and should not be treated as a matter of "no prospective significance" (Opp. Brief, p. 11).

Respectfully submitted,

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1. The Grand Trunk Western Railroad is wholly owned by the Canadian National Railway Company (*Moody's Transportation Manual*, 1955, p. 1309). The New York Central Railroad has substantial Canadian Interests, operates a main line serving Montreal and Quebec, and serves the provinces of Ontario and Quebec which have the bulk of the Dominion's population and manufacturing industries (*Moody's Transportation Manual*, 1955, pp. 954-956).